No. 19-1392

In The
Supreme Court of the United States

THOMAS E. DOBBS, M.D., M.P.H., STATE HEALTH OFFICER OF THE MISSISSIPPI DEPARTMENT OF HEALTH, ET AL.,

Petitioners,

v.

JACKSON WOMEN'S HEALTH ORGANIZATION, ET AL.,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

AMICUS BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE AND BIOETHICS DEFENSE FUND IN SUPPORT OF PETITIONERS

NIKOLAS T. NIKAS
DORINDA C. BORDLEE
BIOETHICS DEFENSE FUND
3312 Cleary Avenue
Metairie, LA 70002
(504) 231-7234
ntnikas@bdfund.org

JAY ALAN SEKULOW
Counsel of Record
STUART J. ROTH
COLBY M. MAY
WALTER M. WEBER
JORDAN A. SEKULOW
LAURA HERNANDEZ
MATTHEW R. CLARK
OLIVIA F. SUMMERS
AMERICAN CENTER FOR LAW & JUSTICE
201 Maryland Ave., N.E.
Washington, DC 20002
(202) 546-8890
sekulow@aclj.org
Counsel for Amicus

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INTEREST OF AMICUS[1]

The American Center for Law and Justice ("ACLJ") is an organization dedicated to the defense of constitutional liberties secured by law, including the defense of the sanctity of human life. ACLJ attorneys have appeared frequently before this Court as counsel for parties, *e.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), or for amici, *e.g.*, *June Medical Servs. v. Russo,* 140 S. Ct. 2103 (2020), addressing a variety of issues.[2]

Bioethics Defense Fund ("BDF") is a public-interest legal and educational organization whose mission is to translate the profound truths of law, science, medicine, and moral philosophy into user-friendly and life-affirming policies on the full range of bioethics issues. BDF does this via education at law schools and medical schools, as well as via strategic litigation and the drafting of model legislation. BDF is often sought out by state legislators and attorneys general to develop strategies on a host of life-protective model bills and related litigation, including measures that require abortion clinics to provide sex trafficking hotlines to women and girls often coerced into abortion, as well as on bills that prohibit clinics from incentivizing women to abort by asking them to sign a "consent to donate"

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[1]Counsel of record for the parties have filed blanket consents for amicus briefs. No counsel for any party authored this brief in whole or in part. No such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity aside from the amici, or their members or counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

[2]This brief is also filed on behalf of nearly 250,000 ACLJ members as an expression of their support for overturning *Roe*.

the "products of conception" on the grounds that their "choice" will help researchers cure disease. *Roe v. Wade* and its progeny have tragically removed meaningful guardrails enacted by state legislatures whose duty it is to protect public health and welfare, including that of pregnant women and their children preyed upon by industries that unjustly commodify them.

SUMMARY OF ARGUMENT

The lower court affirmed on the basis of this Court's precedents creating a right to destroy unborn children up until the point of "viability," precedents regarded far and wide as lacking constitutional warrant. While a lower court has no power to correct Supreme Court errors, this Court has that power and indeed – in the context of interpreting the Constitution – the *duty* to repudiate recognized errors. *Stare decisis* cannot trump adherence to the Constitution as the supreme law of the land, as that would make this Court a higher authority than the Constitution. This Court should disavow its past egregious abrogation of virtually all state police power to protect children and their mothers from the atrocity of abortion.

Moreover, the legitimacy of this Court in the public's eye depends in significant part upon its role as an institution that neutrally and dependably dispenses justice. In this case a lower court has ruled that a state *must* stand idly by, against its will, in the face of blatant injustice, inhumanity, and inconsistency in the law. The lower court opined that this Court's prior decisions interpreting constitutional law *compelled* such a horrific outcome. If that is so, then those decisions must be revisited. The public takes as a given that this Court would *never* tolerate, under the Eighth Amendment, the dismemberment of even the most

vicious criminals; yet that is the standard method for aborting innocent human beings in the womb. The public understands that states properly can proscribe the deliberate dismembering of living animals under animal welfare laws; yet the lower court here thought that prenatal human beings, under this Court's precedents, must be relegated to a status even lower than that of rodents. This Court should dispel the abhorrent notion that the Constitution requires giving states a greater capacity, or even obligation, to protect convicted murderers and brute swine than to protect human babies in the womb.

Finally, abortion is typically promoted as an expression of autonomous freedom, as if abortion represents an ideal of the self-possessed woman determining her future. But this gauzy ideal disregards the cold, hard reality that abortion, in practice, is far too often a tool for *others* to achieve their nefarious goals *at the expense of* women (and the children they carry). Abortion is beloved by sexual traffickers and predators, by irresponsible males, by heartless employers, by parents placing their own reputation over their daughter's wishes and their grandchildren's lives, and by eugenic and racist population planners. For pregnant women and girls, in these contexts at least, abortion is a bane, not a boon.

ARGUMENT

The Constitution does not confer on this Court's rulings a status supreme to the Constitution itself. Nor does the Constitution compel states to treat unborn children less humanely than the worst criminals or even animals. Nor does the Constitution require this Court to overlook the many anti-woman, anti-human uses to which this supposed "right" can be and often is

put. This Court should repudiate *Roe*, *Casey*, and the invented "viability" line, and reverse the judgment below.

I. WHILE *STARE DECISIS* PLAYS AN IMPORTANT ROLE IN ADJUDICATION, THAT DOCTRINE CANNOT EXALT KNOWINGLY INCORRECT SUPREME COURT DECISIONS, LIKE *ROE*, *CASEY*, AND THEIR "VIABILITY" LINE, OVER THE CONSTITUTION ITSELF.

Defenders of the decision below contend that this Court should, as a matter of *stare decisis*, give priority – even over a more faithful interpretation of the Constitution – to past decisions marking prenatal "viability" as the cut-off before which abortion can never be prohibited. Such an approach is incompatible with both the Constitution and the judicial oath of office and grossly overreads the proper role of *stare decisis*.

A. *Stare Decisis* Cannot Mean Knowingly Exalting Incorrect Judicial Opinions over the Constitution.

The doctrine of *stare decisis* – namely, the judicial practice of presumptively (but not always) declining to revisit settled legal matters – is essential to judicial efficiency. A court (not to mention the litigants) simply would not have the time to revisit and reanalyze from scratch every single step of a legal adjudication in every single case. Instead, absent some good reason to reopen the particular matter in question, a court properly relies upon the body of previous court decisions.

However, the default assumption that prior decisions are correct cannot justify a *knowing* failure to follow *the Constitution*. The Supremacy Clause of the Constitution does *not* state,

> The Decisions of the supreme Court shall be the supreme Law of the Land, any Thing in this Constitution to the Contrary notwithstanding.

Not U.S. Const. art. VI, cl. 2.

To be sure, the Court need not always (though it may) *sua sponte* address and correct prior erroneous constitutional rulings. Indeed, this Court often notes when the parties have not asked the Court to revisit past precedents. *E.g.*, *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 483 (2010) ("The parties do not ask us to reexamine any of these precedents, and we do not do so"); *Fisher v. Univ. of Tex.*, 570 U.S. 297, 311 (2013) ("There is disagreement about whether *Grutter* [*v. Bollinger*, 539 U.S. 306 (2003),] was consistent with the principles of equal protection in approving this compelling interest in diversity. . . . But the parties here do not ask the Court to revisit that aspect of *Grutter*'s holding"); *Northern Ins. Co. v. Chatham County*, 547 U.S. 189, 193 (2006) (discussing constitutional principles "which no party asks us to reexamine today"); *Barr v. Amer. Ass'n of Pol. Consultants*, 140 S. Ct. 2335, 2347 n.5 (2020) (plurality) ("Before overruling precedent, the Court usually requires that a party ask for overruling, or at least obtains briefing on the overruling question").

Moreover, the Court may decline an invitation to reexamine past precedent where there do not appear to be strong reasons to believe the past decision improperly construed the Constitution. As this Court

explained in *Cook v. Moffat & Curtis*, 46 U.S. 295, 309 (1847), where

> the [constitutional] questions involved . . . have already received the most ample investigation by the most eminent and profound jurists, both of the bar and the bench, [and thus] it may be well doubted whether further discussion will shed more light, or produce a more satisfactory or unanimous decision[, then] the court do [sic] not think it necessary or prudent to depart from the safe maxim of *stare decisis.*

See also, e.g., Evans v. Michigan, 568 U.S. 313, 328 (2013) (declining to overrule precedents when, *inter alia*, "the logic of these cases still holds"); *United States v. Reidel*, 402 U.S. 351, 356 (1971) (noting that Supreme Court precedent "has squarely placed obscenity and its distribution outside the reach of the First Amendment and they remain there today" and noting that a subsequent decision "did not overrule [the prior holding] and we decline to do so now").

When a precedent is called into question, however, and that precedent is *wrong*, the doctrine of *stare decisis* cannot give "tenure" to that erroneous construction of the Constitution. To do so would be to add a third, unauthorized route to amending the Constitution – a route that, unlike proposed amendments from Congress or a convention of the states, does not face the demanding standard of ratification by three-fourths of the states. *See* U.S. Const. art. V.

As this Court noted in a *non*-constitutional context, "*stare decisis* has consequence only to the extent it sustains incorrect decisions; correct judgments have no need for that principle to prop them up." *Kimble v.*

Marvel Ent., 576 U.S. 446, 455 (2015). But if fidelity to the Constitution is to be a hallmark of this Court as an institution of laws, not of men, then the Justices *must* prefer a faithful reading of the Constitution to an *acknowledged* false reading, regardless of whether a past majority of this Court, in a previous ruling, has embraced the incorrect interpretation. "No interest which could be served by so rigid an adherence to *stare decisis* is superior to the demands of a system of justice based on a considered and a consistent application of the Constitution." *Graves v. Schmidlapp*, 315 U.S. 657, 665 (1942). Hence, there is no proper place under our Constitution for a Court or Justice to say, "We are persuaded that *Ruling A* erroneously interpreted the Constitution, but we will nevertheless adhere to that ruling in preference to the Constitution itself."

To embrace an incorrect judicial interpretation of the Constitution (again, *stare decisis* is not needed to defend *correct* decisions), rather than ruling as required by the Constitution, is to exalt court rulings above the Constitution, in violation of both the *actual* Supremacy Clause, U.S. Const. art. VI, cl. 2 (the Constitution is the "supreme Law of the Land"),[3] and the judicial oath of office (in which the judge or Justice pledges fidelity to the Constitution).

To reach this conclusion one need only look to the logic of *Marbury v. Madison*, 5 U.S. 137 (1803). In *Marbury*, this Court addressed the question whether the judiciary could rule that a legislative act was "repugnant to the constitution" and thus "void" – i.e.,

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[3]"The Supremacy Clause conspicuously does not include 'decisions by the United States Supreme Court' when naming the sources of law at the top of the legal food chain." Gary Lawson, *Mostly Unconstitutional: The Case Against Precedent Revisited*, 5 Ave Maria L. Rev. 1, 6 (2007).

unconstitutional. *Id.* at 180. The answer was "yes" – precisely because the Constitution bound both the legislature and the judiciary.

The notion of a written constitution, Chief Justice Marshall explained for the Court, was that such document "form[s] the fundamental and paramount law of the nation," *id.* at 177, which "establish[es] certain limits not to be transcended" by the various branches (Marshall calls them "departments") of the federal government, *id.* at 176. These branches, of course, include the judiciary: "courts, as well as other departments, are bound by that instrument." *Id.* at 180. Thus, while "[i]t is emphatically the province and duty of the judicial department to say what the law is," *id.* at 177, the courts must "decide the case . . . conformably to the constitution," *id.* at 178. In case of a conflict between the Constitution and some other source of law, the Constitution, as "a paramount law," *id.*, must prevail. Applying this logic to the particular case of unconstitutional legislation, the "great jurist of our Court," *Trump v. Vance*, 140 S. Ct. 2412, 2431 (2020), explained in *Marbury*:

> So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty. If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply.

5 U.S. at 178 (paragraph breaks omitted). But since the Constitution also is "a rule for the government of courts," *id.* at 180, it follows that judicial acts – court rulings – must likewise be subordinate to the Constitution.[4] Consider the same passage from *Marbury*, 5 U.S. at 178, altered to insert "precedent" in place of the references to legislation:

> So if a [precedent] be in opposition to the constitution; if both the [precedent] and the constitution apply to a particular case, so that the court must either decide that case conformably to the [precedent], disregarding the constitution; or conformably to the constitution, disregarding the [precedent]; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty. If then the courts are to regard the constitution; and the constitution is superior to any [precedent of the courts]; the constitution, and not such [precedent], must govern the case to which they both apply.

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[4]As Prof. Michael Paulsen has written:

> Under Chief Justice John Marshall's reasoning (and Alexander Hamilton's before him in *Federalist* No. 78), the duty and power of judicial review do not mean the judiciary is supreme over the Constitution. Rather, the duty and power of judicial review exist in the first place because the Constitution is supreme *over the judiciary* and governs its conduct. As Marshall wrote in *Marbury*, "the framers of the constitution contemplated that instrument as a rule for the government of courts, as well as of the legislature."

Michael S. Paulsen, *The Irrepressible Myth of* Marbury, 101 Mich. L. Rev. 2706, 2709 (2003) (footnote omitted; emphasis in original).

This is only common sense.[5] Moreover, as Chief Justice Marshall continued, the judicial oath of office reinforces the same obligation of fidelity to the Constitution:

> [I]t is apparent, that the framers of the constitution contemplated that instrument, as a rule for the government of courts, as well as of the legislature. Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies, in an especial manner, to their conduct in their official character. *How immoral to impose it on them, if they were to be used as the instruments, and the* ***knowing*** *instruments, for violating what they swear to support!* . . . If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime.

Id. at 179-80 (emphasis added; paragraph breaks omitted).[6]

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[5]The Constitution "reserve[s] to the States" and "to the people" all powers not delegated to the federal government. U.S. Const. amend. X. Therefore, the judicial recognition of a nonexistent right, which then overrides state legislative power, is precisely a case of "opposition to the constitution" as that phrase is used in *Marbury*.

[6]Of course, judicial precedent can be consulted for its informative and persuasive weight: there is value in reading and considering what a prior court thought about a question. But that is quite different from treating such a prior opinion as equivalent to – or superior to – the constitutional text itself.

B. This Court Should Not, in the Name of *Stare Decisis*, Exalt over the Constitution *Roe*, *Casey*, or an Invented Viability Line.

The decision below rests upon this Court's flawed precedents. This Court declared in *Roe v. Wade*, 410 U.S. 113 (1973), as modified in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), that abortions – the intentional killing of human beings before birth – are constitutionally protected, and that the state cannot outlaw such violence before the child has become "viable." Abortion advocates, recognizing the doctrinal flimsiness of this Court's abortion jurisprudence, invoke the doctrine of *stare decisis* as counseling adherence to *Roe* and *Casey* even though they were wrongly decided. This Court should firmly decline that invitation. Instead, if this Court agrees that *Roe* and *Casey's* disallowance of state legal protection for babies of 15 weeks' gestation is inconsistent with a faithful reading of the Constitution, this Court is duty-bound to prefer fidelity to the Constitution over fidelity to its own contrary precedent.

It would be especially ironic to prefer adherence to *Roe* and *Casey* over the Constitution where *Roe* itself marked a dramatic departure from previous understanding of the state police power in the area of abortion. *Compare Missouri ex rel. Hurwitz v. North*, 271 U.S. 40 (1926) (rejecting Fourteenth Amendment Due Process and Equal Protection challenge to revocation of physician's license for commission of an abortion); *Ex parte Jackson*, 96 U.S. 727, 736 (1877) (recognizing instruments or instructions for the "procuring of abortion" as "matter deemed injurious to the public morals" and "corrupting"); *Hawker v. New York*, 170 U.S. 189 (1898) (upholding disqualification of physician from practice of medicine based on prior

felony conviction of abortion). The *stare decisis* doctrine itself, after all, includes consideration of "whether the decisions in question constituted a departure from *prior* decisions," *Patsy v. Bd. of Regents*, 457 U.S. 496, 501 n.3 (1982) (emphasis added). *Roe v. Wade* cast aside centuries of understanding of the applicability of the police power to abortion, thereby profoundly unsettling the law and creating a constitutional wound that continues to fester – and will do so until this Court corrects its misstep.

C. The Proper Response of this Court to a Prior Unjust Decision Is the Repudiation of that Decision.

As every member of this Court must acknowledge (having at one time or another dissented), this Court is *not* infallible. Indeed, some of this Court's past decisions enshrined the most profound injustices against human beings. Consider a few of the most notorious:

1. Dred Scott

In *Scott v. Sandford*, 60 U.S. 393 (1857), this Court declared that black slaves

> had for more than a century before been regarded as beings of an inferior order, and altogether unfit . . . and so far inferior that they had no rights which the white man was bound to respect . . . . [The enslaved person] was bought and sold and treated as an ordinary article of merchandise and traffick[ed] whenever a profit could be made.

Id. at 407. Justice McLean, in dissent, protested: "A slave is not a mere chattel. He bears the impress of his Maker, and is amenable to the laws of God and man; and he is destined to an endless existence." *Id.* at 550 (McLean, J., dissenting).

2. *Plessy v. Ferguson*

In *Plessy v. Ferguson*, 163 U.S. 537 (1896), this Court upheld a state law enforcing "separate but equal" public accommodations for black and white citizens, saying:

> We consider [a] fallacy . . . the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it. . . . Legislation is powerless to eradicate racial instincts, or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation.

Id. at 551–52. The lone dissenter said,

> Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved.

Id. at 559 (Harlan, J., dissenting).

3. *Buck v. Bell*

In *Buck v. Bell*, 274 U.S. 200 (1927), this Court upheld a coercive Virginia eugenics law that allowed the forcible sterilization of Carrie Buck, diagnosed as "feeble minded." *Id.* at 205. Justice Oliver Wendell Holmes, Jr., wrote for the majority:

> It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the fallopian tubes. Three generations of imbeciles are enough.

274 U.S. at 207.

4. *Korematsu v. United States*

In *Korematsu v. United States*, 323 U.S. 214 (1944), this Court upheld a military order, issued after Japan's attack on Pearl Harbor, forcing American citizens of Japanese ancestry who lived on the West Coast to relocate to internment camps. This Court upheld the constitutionality of the ethnically-based forcible relocation order. All three dissenting opinions addressed the underlying injustice of the military order: that guilt by group association was imposed, rather than individual guilt. Justice Murphy stated:

> I dissent, therefore, from this legalization of racism. Racial discrimination in any form and in any degree has no justifiable part whatever in our democratic way of life. It is unattractive in any

> setting but it is utterly revolting among a free people who have embraced the principles set forth in the Constitution of the United States. All residents of this nation are kin in some way by blood or culture to a foreign land. Yet they are primarily and necessarily a part of the new and distinct civilization of the United States. They must, accordingly, be treated at all times as the heirs of the American experiment, and as entitled to all the rights and freedoms guaranteed by the Constitution.

Id. at 233–42 (Murphy, J., dissenting).

* * *

As Justice Gorsuch recently observed, "blind obedience to *stare decisis* would leave this Court still abiding grotesque errors like *Dred Scott v. Sandford*, *Plessy v. Ferguson*, and *Korematsu v. United States*." *Gamble v. United States*, 139 S. Ct. 1960, 2005-06 (2019) (Gorsuch, J., dissenting). The proper response to such notorious injustices is not invocation of *stare decisis*, but firm repudiation.

This Court already has acknowledged the legitimacy of states and individuals concluding that abortion is a profound injustice. Abortion is "inherently different from other medical procedures, because no other procedure involves the purposeful termination of a potential life," *Harris v. McRae*, 448 U.S. 297, 325 (1980), or more accurately, the purposeful termination of a life with potential. In abortion, "the fetus will be killed," *Gonzales v. Carhart*, 550 U.S. 124, 159 (2007),

or, to put it less clinically,[7] the procedure will "abort the infant life [which the mother] once [pro]created and sustained," *id.* Therefore, "there are common and respectable reasons for opposing [abortion]," *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993), just like there are common and respectable reasons for opposing any other form of homicide. Indeed, "men and women of good conscience" can "find abortion offensive to [their] most basic principles of morality." *Casey*, 505 U.S. at 850.

Mississippi, like many other states, recognizes the fundamental injustice of abortion. The decision in *Roe*, elevating that injustice to the level of a constitutional right, and the decision in *Casey*, propping up that injustice, have earned their place in the company of *Dred Scott*, *Plessy*, *Buck v. Bell*, and *Korematsu*.

II. WHAT IS DONE TO BABIES IN THE WOMB IN POST-15 WEEK ABORTIONS WOULD VIOLATE THE EIGHTH AMENDMENT IF DONE TO CONVICTED CRIMINALS AND WOULD VIOLATE ANIMAL CRUELTY LAWS IF DONE TO ANIMALS.

Mississippi found – accurately – that the standard method for abortion after 15 weeks of gestation is to rip apart and remove the body of the prenatal child. Pet. at 7-8. Such "brutal," "gruesome" dismemberment, *Gonzales v. Carhart*, 550 U.S. at 182 (Ginsburg, J., joined by Stevens, Souter, & Breyer, JJ., dissenting), would be unconstitutional if a state inflicted it upon

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[7]The term "fetus" is just a clinical term for a particular stage of human life. That a pregnant woman could be referred to, analogously, as a "gravida," would not make her any less human.

Jack the Ripper. And states can certainly ban such acts against Fido the Dog. How then, can there be a constitutional right to tear prenatal humans limb from limb? The answer is that there is not. This Court should therefore reverse.

A. The Notion of a Constitutional Right to Late-Term Abortions Is in Grave Tension with the Eighth Amendment.

The Eighth Amendment bars "cruel and unusual punishment." Abortion at and after 15 weeks typically employs extremely cruel and barbaric methods to slay the child in the womb. As this Court recognized, in the second trimester (after 12 weeks of gestation), "[t]he most commonly used procedure is called 'dilation and evacuation' (D&E)," *Stenberg v. Carhart*, 530 U.S. 914, 924 (2000). As Justice Kennedy explained in greater detail,

> As described by Dr. Carhart, the D&E procedure requires the abortionist to use instruments to grasp a portion (such as a foot or hand) of a developed and living fetus and drag the grasped portion out of the uterus into the vagina. Dr. Carhart uses the traction created by the opening between the uterus and vagina to dismember the fetus, tearing the grasped portion away from the remainder of the body. The traction between the uterus and vagina is essential to the procedure because attempting to abort a fetus without using that traction is described by Dr. Carhart as "pulling the cat's tail" or "dragging a string across the floor, you'll just keep dragging it. It's not until something grabs the other end that you are going to develop traction." The fetus, in many cases, dies

> just as a human adult or child would: It bleeds to death as it is torn limb from limb. The fetus can be alive at the beginning of the dismemberment process and can survive for a time while its limbs are being torn off. Dr. Carhart agreed that "when you pull out a piece of the fetus, let's say, an arm or a leg and remove that, at the time just prior to removal of the portion of the fetus, . . . the fetus [is] alive." Dr. Carhart has observed fetal heartbeat via ultrasound with "extensive parts of the fetus removed," and testified that mere dismemberment of a limb does not always cause death because he knows of a physician who removed the arm of a fetus only to have the fetus go on to be born "as a living child with one arm." At the conclusion of a D&E abortion no intact fetus remains. In Dr. Carhart's words, the abortionist is left with "a tray full of pieces."

Id. at 958-59 (Kennedy, J., dissenting) (citations omitted). Judge Ho in this case understandably remarked, "It would be surprising if the Constitution *requires* States to use execution methods that avoid causing unnecessary pain to convicted murderers, but does not even *permit* them from preventing abortions that cause unnecessary pain to unborn babies." Pet. App. 25a-26a (Ho, J., concurring in result) (emphasis in original). Yet that is what the lower court felt was compelled by this Court's precedents.

It has long been settled that the Eighth Amendment to the Constitution forbids states from inflicting upon even the worst of criminals (capital offenders) such horrors as dismemberment.

> Cruel and unusual punishments are forbidden by the Constitution . . . [I]n very atrocious crimes . . .

> circumstances of terror, pain, or disgrace were sometimes superadded [to execution]. Cases mentioned by the author are, where the prisoner was drawn or dragged to the place of execution, in treason; or where he was embowelled alive, beheaded, and quartered, in high treason. . . . [I]t is safe to affirm that punishments of torture, such as those mentioned by the commentator referred to, and all others in the same line of unnecessary cruelty, are forbidden by th[e Eighth] amendment to the Constitution.

Wilkerson v. Utah, 99 U.S. 130, 134-36 (1878) (citations and paragraph breaks omitted). *See also Campbell v. Wood*, 511 U.S. 1119, 1122 (1994) (Blackmun, J., dissenting from denial of certiorari) ("partial or complete decapitation of the person, as blood sprays uncontrollably, obviously violates human dignity"). As Justice Brennan opined in *Glass v. Louisiana*, 471 U.S. 1080 (1985),

> in explaining the obvious unconstitutionality of such ancient practices as disemboweling while alive, drawing and quartering, [and] public dissection, . . ., the Court has emphasized that the Eighth Amendment forbids "inhuman and barbarous" methods of execution that go at all beyond "the mere extinguishment of life" and cause "torture or a lingering death." . . . [B]asic notions of human dignity command that the State minimize "mutilation" and "distortion" of the condemned prisoner's body. These principles explain the Eighth Amendment's prohibition of such barbaric practices as drawing and quartering.

Id. at 1084-85 (Brennan, J., joined by Marshall, J., dissenting from denial of certiorari) (citations omitted).

Plainly, a state could not constitutionally employ "dismemberment abortion" to execute prisoners, no matter how grievous the convict's crimes might be. Yet the court below held that this Court's precedents required it to immunize the same grotesque practice when perpetrated against innocent human children prior to birth.

B. The Notion of a Constitutional Right to Late-Term Abortions Is in Grave Tension with the Permissibility of Animal Cruelty Laws.

It is common practice – and constitutional – for states to ban animal cruelty, which would include killing an animal by pulling it to pieces.

In *United States v. Stevens*, 559 U.S. 460 (2010), this Court confronted a federal law restricting so-called "crush videos." While the *Stevens* decision turned on the First Amendment, its discussion of the underlying issue of animal cruelty is informative.

The law at issue defined "animal cruelty" to include practices "in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed," *id.* at 465 (quoting statute). This Court noted the long tradition of banning animal cruelty:

> As the Government notes, the prohibition of animal cruelty itself has a long history in American law, starting with the early settlement of the Colonies. Reply Brief 12, n. 8; *see, e.g.,* The Body of Liberties § 92 (Mass. Bay Colony 1641), *reprinted in* American Historical Documents 1000-1904, 43 Harvard Classics 66, 79 (C. Eliot ed. 1910) ("No

> man shall exercise any Tirranny or Crueltie towards any bruite Creature which are usuallie kept for man's use").

Id. at 469. *See also id.* at 476 (acknowledging "a broad societal consensus against cruelty to animals") (citation and internal quotation marks omitted); *id.* at 491 (Alito, J., dissenting) ("It is undisputed that the conduct depicted in crush videos may constitutionally be prohibited. All 50 States and the District of Columbia have enacted statutes prohibiting animal cruelty") (citations omitted).

Unsurprisingly, as Justice Alito noted, all fifty states and the District of Columbia ban cruelty to animals.[8] Hence, conduct analogous to dismemberment abortion, if perpetrated against an animal, would be subject to criminal prohibition. *E.g.*, *A.J.R. v. State*, 3 N.E.3d 1000, 1007 (Ind. Ct. App. 2014) ("a person who knowingly or intentionally severs the limb of a wild animal which subsequently bleeds to death as a result of the injury would have mutilated that animal"); *see also United States v. Richards*, 755 F.3d 269, 272 (5th Cir. 2014) (defendants were charged with state felony cruelty to animals and with violation of amended federal "crush videos" law because they had practiced "binding animals . . ., chopping off their limbs with a cleaver, removing their innards, ripping off their heads"). Yet the court below felt compelled by this Court's precedents to declare that the state was constitutionally barred from prohibiting the same cruel, inhumane practices against members of the species *homo sapiens*, at least before birth.

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[8] *See* Appendix to ACLJ Amicus Br., *Harris v. W. Ala. Women's Ctr.*, No. 18-837 (U.S. Feb. 4, 2019) (listing statutes), *available at* https://tinyurl.com/ACLJHarrisAmicus.

III. ABORTION, RATHER THAN AN ACT OF FEMALE AUTONOMY, IS TOO OFTEN A HANDY TOOL FOR THOSE PURSUING NEFARIOUS PURPOSES AT THE EXPENSE OF WOMEN.

Contrary to the clichéd pro-abortion argument that abortion is a *choice* made by women that brings freedom, many women, if not an overwhelming majority of women, "choose" abortion because they are pressured – or coerced – by others. Often, that pressure to have an abortion comes from others who prioritize their own self-interests above the best interests and wishes of the pregnant woman: "once abortion becomes available, it becomes the most attractive option for everyone *around* the pregnant woman." Frederica Mathewes-Green, "When Abortion Suddenly Stopped Making Sense," *Nat'l Rev.* (Jan. 22, 2016) (emphasis in original). Moreover, abortion can serve as a tool for furthering broader eugenic and racist goals. Pet. App. 34a-35a (Ho, J., concurring in judgment).

In a study that compared the experiences of Russian and American women with abortion, 64% of the American women surveyed reported feeling pressured by others to obtain an abortion. Vincent M. Rue, *et al.*, "Induced Abortion and Traumatic Stress: a Preliminary Comparison of American and Russian Women," 10 *Med. Sci. Monit.* 9 (2004), *available at* https://pubmed.ncbi.nlm.nih.gov/15448616/.[9] Another

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[9]Study participants were "[w]omen who had experienced a pregnancy loss (spontaneous abortion, induced abortion, stillbirth, or adoption) [who] were asked to participate in a study of women's reactions to a pregnancy loss. Data were collected in 1994 at U.S. and Russian healthcare facilities (public and private hospitals, and health care clinics). . . . The sample in [this] study includes

study, published in the *Journal of American Physicians and Surgeons*, similarly found that nearly 74% of the post-abortive women surveyed admitted "that their decision to abort was [not] entirely free from even subtle pressure from others to abort," over 58% "reported aborting to make others happy," and 28.4% of the women specifically chose abortion "out of fear of losing their partner if they did not abort." Priscilla K. Coleman, Ph.D., "Women Who Suffered Emotionally from Abortion: A Qualitative Synthesis of Their Experiences," 22 *J. Amer. Physicians & Surgeons* 113, 115 (2017), *available at* https://www.jpands.org/vol22no4/coleman.pdf.[10] 66% of the women reported "know[ing] in their hearts that they were making a mistake when they underwent the abortion." *Id.* Even the abortion-sympathetic Guttmacher Institute reports that 12 percent of women seeking abortions gave as a "specified reason[]" for their abortion that a "[h]usband or partner wants me to have the abortion." Lawrence B. Finer *et al.*, "Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives," 37 *Persps. on Sexual & Reprod. Health* 110, 113 (2005) (Table 2). These statistics reveal that a substantial number of women in America who supposedly "choose" abortion, rather than being empowered to make a "choice," are actually being pressured by others into abortions they may not want. As one former abortion supporter observed, "No one wants an abortion as she wants an ice cream cone or a Porsche. She wants an abortion as

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only those women who had one or more induced abortion and no miscarriages, stillbirths, or adoptions . . . ." *Id.*

[10]The women who responded to this survey were women who voluntarily contacted crisis pregnancy centers for post-abortion care.

an animal, caught in a trap, wants to gnaw off its own leg." Mathewes-Green, *supra* p. 23 (internal quotation marks omitted).

This becomes even clearer when examining specific types of coercion to abort.

Abortion and Human Trafficking

Human trafficking "is a widespread and highly profitable crime that generates an estimated $150 billion worldwide per year . . .," 2021 *Trafficking in Persons Report*, U.S. Dep't of State (July 26, 2021 3:00 PM), https://www.state.gov/reports/2021-trafficking-in-persons-report/, with two-thirds of that $150 billion stemming from commercial sexual exploitation, or sex trafficking, *ILO Says Forced Labour Generates Annual Profits of US $ 150 Billion*, Int'l Lab. Org. (20 May 2014), https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_243201/lang--en/index.htm. The National Human Trafficking Hotline's most recent statistics from 2019 show 11,500 *reported* cases of human trafficking in the United States alone. *Hotline Statistics*, Nat'l Hum. Trafficking Hotline (July 26, 2021, 3:08 PM), https://humantraffickinghotline.org/states.[11] Of those 11,500 cases, 8,248 of them were sex trafficking cases and another 505 cases were sex and labor related, meaning over 76% of all *reported* human

[11]According to the Trafficking Hotline, "[t]rafficking situations learned about through the Trafficking Hotline likely represent only a small subset of actual trafficking occurring in the United States. Therefore, this data must not be confused with the prevalence of human trafficking in the United States." https://humantraffickinghotline.org/sites/default/files/Polaris-2019-US-National-Human-Trafficking-Hotline-Data-Report.pdf (*see* "About this Data" box).

trafficking cases in the United States in 2019 involved some sort of sexual exploitation. *Id.*

According to a 2005 report funded by the Department of Justice, "[h]uman traffickers are engaged in a wide range of crimes both against their victims (rape, assault, extortion, homicide, forced abortions, etc.) and against the state . . . ." Kevin Bales & Steven Lize, *Trafficking in Persons in the United States: A Report to the National Institute of Justice*, 45 (Mar. 2005), *available at* https://www.ojp.gov/pdffiles1/nij/grants/211980.pdf. Another study found "[t]he prevalence of forced abortions is an especially disturbing trend in sex trafficking." Laura J. Lederer & Christopher A. Wetzel, *The Health Consequences of Sex Trafficking and Their Implications for Identifying Victims in Healthcare Facilities*, 23 Annals Health L. 61, 73 (2014), *available at* https://www.icmec.org/wp-content/uploads/2015/10/Health-Consequences-of-Sex-Trafficking-and-Implications-for-Identifying-Victims-Lederer.pdf. The survivors of sex trafficking studied "reported that they often did not freely choose the abortions they had while being trafficked." *Id.* at 73.

> One victim noted that "in most of [my six abortions,] I was under serious pressure from my pimps to abort the babies." Another survivor, whose abuse at the hands of her traffickers was particularly brutal, reported seventeen abortions and indicated that at least some of them were forced on her.

Id. at 73-74. Forced abortions in the context of sex trafficking, whether by subtle or more forceful pressure, cannot in any way be viewed as a liberating "choice" for women. Yet, the abortion industry does

little if anything to combat forced abortion at the hands of sex traffickers.

In 2017, a former Planned Parenthood employee stated that Planned Parenthood didn't "train[] employees how to spot and report sex trafficking – but [instead] how not to get caught saying incriminating things to undercover journalists." Bradford Richardson, "Planned Parenthood Failed to Take Sex Trafficking Seriously After Infamous Sting, Ex-Employee Says," *Wash. Times* (Jan. 17, 2017), https://www.washingtontimes.com/news/2017/jan/17/planned-parenthood-failed-take-sex-trafficking-ser/. This training was in response to "Live Action's 2011 investigation [which] caught on camera eight Planned Parenthood workers at seven facilities who were willing to help a man who identified himself as a sex trafficker covertly obtain abortions and other reproductive health care services for minors as young as 14." *Id.* Of course, if abortion providers will give a pass to someone who openly admits to trafficking, they are still more likely to "serve" pimps and traffickers who pretend to be the woman's boyfriend or relative.

Abortion and Sexual Predators

Abortion supplies a handy means for sexual predators to conceal obvious evidence – pregnancy and childbirth – of their exploitation. *See, e.g., United States v. Raniere*, 2019 U.S. Dist. LEXIS 84634 (EDNY May 3, 2019) (abortions for women impregnated by leader of apparent cult); Tonya Alanez, "58 porno videos of 15-year-old girl lead to Davie man's arrest," South Florida Sun Sentinel (Oct. 23, 2019) ("The victim stated that she got pregnant from the defendant and he took her to the clinic to have an abortion"); Carole Novielli, "Man Took 14-Year-Old For Three Abortions

After Impregnating Her, Clinics Ignored the Rapes," *Life News* (July 30, 2014); David McFadden, "Probation revoked for man in impregnating 11-year-old, forcing to get abortion," *ABC13 News* (July 19, 2018); "Settlement reached in suit over teen abortion," *The Columbus Dispatch* (Apr. 28, 2011) (soccer coach impregnated 14-year-old, then pretended to be her father in consenting to the abortion).

Abortion and Domestic Abuse

Abortion is an act of violence that takes the life of a prenatal child. Often, the woman getting an abortion is also a victim of violence – which greatly influences the woman's "choice".One study revealed that among women who chose abortion "the probability of being a victim of [intimate partner violence] in the past year . . . was almost three times higher than for women [who chose to continue their pregnancy]." Dominique Bourassa, MD, & Jocelyn Bérubé, MD, "The Prevalence of Intimate Partner Violence Among Women and Teenagers Seeking Abortion Compared with Those Continuing Pregnancy," 29 *J. Obstet. Gynaecol. Can.* 415, 415 (2007).

According to abortion advocates, a woman should be able to obtain an abortion on the theory that acceding to the abuser's desires will reduce future abuse. The truth, however, is that abortion even as appeasement does not free a woman from abuse.

> A survey of 1127 women undergoing a second or subsequent abortion found that they were more likely to have experienced abuse by a male partner, sexual abuse or coercion. Of women presenting for a first abortion, 24% reported a major conflict and fights with the man involved in the pregnancy; 30%

> of women having a second abortion reported relationship violence; and women having a third or subsequent abortion were >2.5 times as likely to report a history of physical or sexual abuse by a male partner.

Gillian Aston & Susan Bewley, "Abortion and Domestic Violence," 11 *The Obstetrician & Gynaecologist* 163, 165 (2009). Consider as well the following examples:

- Eryn Taylor, "Police: Man Beats Girlfriend After She Refuses to Have an Abortion," *News Channel 3* (Sep. 5, 2016), https://www.wreg.com/news/suspect-beats-girlfriend-after-she-refuses-to-have-abortion/ (man beat his girlfriend because she refused to get an abortion; he "told the woman she needed to get rid of her baby," and when she refused, the man "allegedly began hitting her with his fist and began choking her. The victim frantically tried to get out of the car, but [he] pulled her back in. He then parked the car, pulled the victim out and reportedly began kicking her in the head creating a large gash to her head").

- Joe Nelson, "Charge: Pregnant Woman Beaten by Duo After Refusing to Have an Abortion," *Bring Me The News: Minn. News* (May 1 2021), https://bringmethenews.com/minnesota-news/charges-pregnant-woman-beaten-by-duo-after-refusing-to-have-abortion (woman, six months pregnant, was beaten by two men who "specifically targeted her abdomen"; woman stated that the father "consistently pressured her to have an abortion and threatened to get people to jump her and cause her to lose the baby. She told police that

[he] once told her, 'I'm gonna get somebody to stomp that baby out of you.'")

- "Ohio man Dominic Holt-Reid sentenced to 13 years for attempted forced abortion," *CBSNews.com* (June 10, 2011) (man took his pregnant girlfriend to abortion clinic at gunpoint; prosecutor said man grabbed Burgess by the neck and began strangling her while saying, "We are not having this baby, Yolanda")

Countless further instances could be added. *See, e.g.,* Steven Ertelt, "Man Threatened to Slit His Baby's Throat if His Ex-Girlfriend Didn't Have Abortion" *LifeNews* (Aug. 19, 2020) (listing, after article, numerous other instances, with links). The abortion, rather than freeing the woman, only adds to the list of emotional and physical traumas she has suffered.

Abortion and Male Irresponsibility

Of course, abortion provides an escape hatch for irresponsible men who fall short of physical abusers as well. While some may resort to drastic methods for imposing their will, *e.g.*, AP, "Man Uses Sex Video in Abortion Plot," *L.A. Times* (Nov. 8, 1998) (threat of distributing sex tape to family to extort woman's acceding to abortion), countless others will exert less blatant pressure, perhaps suggesting an abortion would preserve the relationship or that waiting until "a better time" would be wise. *See* Elizabeth Dwoskin, "Coerced Abortions: A New Study Shows They're Common," *Daily Beast* (Oct. 8, 2010).

Abortion and Employer Coercion

Abortion can also be an appealing "solution" for an employer who does not want pregnancy or child care to hamper an employee's devotion to the company. The passage of the Pregnancy Discrimination Act of 1978 (five years after *Roe v. Wade*) reflects this very real concern. Cases illustrate the problem as well. *See, e.g., Bergstrom-Ek v. Best Oil Co.*, 153 F.3d 851 (8th Cir. 1998) (manager repeatedly pressured employee to have an abortion, contending it would wreck her life and her career); Jessica Hopp & Greg Sandoval, "Mystics Coach Was Cited in Pregnancy Suit," *Wash. Post* (Sept. 16, 2002) (head coach allegedly told assistant to choose between aborting or quitting; suit was settled).

Abortion and Eugenics and Racism

As Justice Thomas noted in his concurring opinion in *Box v. PPINK*,

> the use of abortion to achieve eugenic goals is not merely hypothetical. The foundations for legalizing abortion in America were laid during the early 20th-century birth-control movement. That movement developed alongside the American eugenics movement. And significantly, Planned Parenthood founder Margaret Sanger recognized the eugenic potential of her cause.

139 S. Ct. 1780, 1783 (2019) (Thomas, J., concurring). It is well-known that Sanger, Planned Parenthood's founder, embraced eugenics. Indeed, Planned Parenthood's current CEO has now admitted as much. Alexis McGill Johnson, "I'm the Head of Planned Parenthood. We're Done Making Excuses for Our

Founder," *N.Y. Times* (Apr. 17, 2021). A report from the Center for Urban Renewal and Education, "The Effects of Abortion on the Black Community" (June 2015), highlights that "[b]lack women have the highest abortion ratio in the country, with 474 abortions per 1,000 live births. Percentages at these levels illustrate that more than 19 million black babies have been aborted since 1973," *id.* at 3. In addition, "79% of Planned Parenthood's surgical abortion facilities are strategically located within walking distance of African and/or Hispanic communities." *Id.* And while blacks make up only about 14 percent of the population of the United States, Christine Tamier *et al.*, "Facts About the U.S. Black Population," *Pew Research Center* (Mar. 25, 2021), they get 34 percent of the abortions, "Reported Legal Abortions by Race of Women Who Obtained Abortion by the State of Occurrence," *Kaiser Family Foundation* (2018) (describing 2019 data), meaning that black babies are aborted far in excess of their proportion of the population. Planned Parenthood, of course, is the major abortion provider in this country, doing 354,871 abortions per year according to its latest annual report. Planned Parenthood, Annual Report 2019-2020 (2021), *available at* https://www.plannedparenthood.org/uploads/filer_public/67/30/67305ea1-8da2-4cee-9191-19228c1d6f70/210219-annual-report-2019-2020-web-final.pdf.

Meanwhile, abortion appears to be the principal means for eliminating Down Syndrome children. Julian Quinones & Arijeta Lajka, "'What kind of society do you want to live in?': Inside the country where Down syndrome is disappearing," *CBS News* (Aug. 14, 2017) ("Other countries aren't lagging too far behind [Iceland] in Down syndrome termination rates. According to the most recent data available, the United States has an estimated termination rate for Down syndrome of 67

percent (1995-2011); in France it's 77 percent (2015); and Denmark, 98 percent (2015)). And, of course, Down syndrome is merely one example of an disability that is targeted for extermination through abortion. But abortion is not a "cure." It simply gets rid of the one with the disability.

* * *

A supposed "right" that facilitates such repugnant practices, that is akin to cruel punishments for prisoners and inhuman treatment of animals, and whose continued force depends upon this Court placing greater authority on its own precedents than on the Constitution, is not worthy of the label. This Court should repudiate *Roe* and *Casey*, including the perverse and arbitrary "viability" line.

CONCLUSION

This Court should reverse the judgment of the Fifth Circuit.

Respectfully submitted,

Nikolas T. Nikas
Dorinda C. Bordlee
Bioethics Defense Fund
3312 Cleary Avenue
Metairie, LA 70002
(504) 231-7234
ntnikas@bdfund.org

Jay Alan Sekulow
Counsel of Record
Stuart J. Roth
Colby M. May
Walter M. Weber
Jordan A. Sekulow
Laura Hernandez
Matthew R. Clark
Olivia F. Summers
American Center for
Law & Justice
201 Maryland Ave., N.E.
Washington, DC 20002
(202) 546-8890
sekulow@aclj.org

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